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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

IBP, INC. AND DIANE ARNDT,

Petitioners,

v.

KEVIN WILSON,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the $2 million punitive damage award imposed by the Supreme Court of Iowa to punish conduct resulting in $4,000 in presumed harm should be summarily reversed because it so plainly violates the Due Process Clause of the Fourteenth Amendment as interpreted by this Court in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996), which struck down as unconstitutional a $2 million punitive damage award imposed by the Supreme Court of Alabama to punish conduct resulting in $4,000 in actual harm.

2. Whether the Due Process Clause of the Fourteenth Amendment prohibits a State from allowing a private plaintiff to pursue punitive damages where, as here, the State collects a 75 percent share of the punishment and pays the plaintiff's attorney's fees out of the punishment.

PARTIES INVOLVED AND RULE 29.6 STATEMENT

All parties in the court below are listed in the caption to this petition. IBP, inc. is publicly traded on the New York Stock Exchange. It has no parent corporation or nonwholly-owned subsidiary.

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PETITION FOR WRIT OF CERTIORARI

IBP, inc. and Diane Arndt (jointly referred to as "IBP") petition this Court for a writ of certiorari to review the judgment in this case of the Supreme Court of Iowa.

OPINIONS BELOW

The opinion of the Supreme Court of Iowa, released December 18, 1996, is reprinted at Appendix ("App.") 1a-34a, and is reported at 558 N.W.2d 132 (Iowa 1996). That Court's February 14, 1997 order denying rehearing is reprinted at App. 35a, and is unreported. The trial court's order granting in part IBP's alternative motions for Judgment Notwithstanding the Verdict, New Trial and

Remittitur, filed on March 2, 1995, is reprinted at App. 37a-46a, and is unreported.

JURISDICTION

The Supreme Court of Iowa released its opinion in this case on December 18, 1996, explicitly addressing the propriety of the $2 million punitive damage award under the Due Process Clause. IBP filed a timely petition for rehearing. On February 14, 1997, the Supreme Court of Iowa denied the petition for rehearing. This petition for certiorari is being filed within 90 days of that denial. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

STATEMENT OF THE CASE

A. Factual Background

Respondent Kevin Wilson was working at the Council Bluffs, Iowa, plant of petitioner IBP, inc., when he injured his back on March 15, 1991. (Tr. 18-19) IBP is self-insured for workers compensation purposes. (Tr. 196) Mr. Wilson's care was coordinated by Karen Beam, who was the plant's workers compensation coordinator, and petitioner Diane Arndt, a nurse who was the manager of the plant's occupational health services. Mr. Wilson was referred the day after his injury to Dr. A.K. Agarwal, an orthopedic surgeon. (Tr. 20-21; 101) Dr. Agarwal

diagnosed pulled muscles and prescribed bed rest with a return to light duty on March 19. (Tr. 22; Exh. 26)

Mr. Wilson reported for light duty as directed, but soon went to the dispensary complaining of back pain. The dispensary records show that Mr. Wilson did not have the pain medicine that Dr. Agarwal had prescribed and that he reported not having taken it regularly. (Exh. 21) Contacted by phone, Dr. Agarwal approved the light duty that had been assigned to Mr. Wilson and suggested that Mr. Wilson alternate between standing and sitting. (Exh. 21) Mr. Wilson refused to return to duty and left the plant. (Exh. 21) The examining nurse reported that Mr. Wilson performed some bending and twisting movements without difficulty, and plant security observed Mr. Wilson walking without difficulty as he left. (Exh. 21)

Mr. Wilson saw Dr. Agarwal again on March 23, but was unhappy with the doctor's recommended treatment of medication and physical therapy. (Tr. 24-25) At Mr. Wilson's request, he was referred to Dr. William Hamsa, another orthopedic surgeon. (Tr. 155; Exh. 6) Dr. Hamsa examined Mr. Wilson on April 1, diagnosing an unstable disk and prescribing bed rest. (Exh. 24, at 6, 10-12) At follow-up visits on April 12 and April 26, Dr. Hamsa found improvement, but continued to recommend bed rest. (Exh. 19, at 2) Although Dr. Hamsa expected that Mr. Wilson would have to attend to some routine activities such as eating, his basic advice to Mr. Wilson was "to stay down, get gravity off his back." (Exh. 24, at 12-13)

Mr. Wilson had not returned to work since walking off the job on March 19. On April 2, the plant's workers' compensation coordinator, Karen Beam, requested that corporate security do an activity check on Mr. Wilson during the bed rest period prescribed by Dr. Hamsa. (Tr. 227-28) A similar request was made by Ms. Beam's supervisor, based on a report from Mr. Wilson's mother

that Mr. Wilson was not taking his medication and was not observing his restrictions. (Exh. 16) Such requests reflected standard corporate procedure when an employee reported an injury that could result in a high dollar-value claim or a substantial loss of work days. (Tr. 84, 135) Activity checks were intended to--and often did--expose fraudulent workers' compensation claims. (Tr. 135)

The activity check resulted in numerous sightings of Mr. Wilson driving around town. (Exh. 12) On May 6, Ms. Arndt called Dr. Hamsa and told him, according to Dr. Hamsa's contemporaneous notes, that "videotape has been obtained of Mr. Wilson working on his car and out doing other activities without any apparent distress." (Exh. 19) Although there was a videotape of Mr. Wilson, which was admitted at trial, it did not show him working on his car. (Exh. 17)[1]

At Mr. Wilson's next appointment with Dr. Hamsa on May 17, Mr. Wilson showed continued improvement. (Tr. 45; Exh. 19) Upon being advised by Dr. Hamsa that he was ready to return to light duty, however, Mr. Wilson accused Dr. Hamsa of being an employee of IBP. (Exh. 19) When Dr. Hamsa informed Mr. Wilson that IBP had "documented evidence that he has been out and not following" Dr. Hamsa's advice, Mr. Wilson admitted that "he was out paying bills or looking after his children as well as other activities." (Exh. 19)

Because Mr. Wilson was not satisfied with the care he received from Dr. Hamsa, he was referred by Ms. Arndt to a third doctor--this time a neurologist, who agreed with Dr. Hamsa that light duty was appropriate. (Tr. 34-35; Exh.

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[1] It is unclear whether Ms. Arndt was aware of the existence of the tape at the time she called Dr. Hamsa, and the jury apparently concluded that she was not.

19) Although Mr. Wilson had by that time finally returned to work, Ms. Arndt referred him to yet another doctor--a neurosurgeon who offered Mr. Wilson the option of surgery, which was accepted. (Tr. 37; Exh. 30; Exh. 25) The surgery was successful. (Exh. 25)

Following the surgery, Mr. Wilson never returned to work at IBP. (Tr. 54-55) He has stipulated that he received a full and fair workers' compensation settlement for his injury. (Tr. 317)

B. Proceeding In The Courts Below

Mr. Wilson brought suit against IBP and Ms. Arndt, claiming, *inter alia,* that Ms. Arndt slandered him by falsely telling Dr. Hamsa that there was a videotape that showed him working on his car and doing other activities when he was supposed to be on bed rest and that Ms. Arndt breached a fiduciary duty to him by giving the doctor inaccurate information relating to Mr. Wilson's condition. After a two day trial, and after Mr. Wilson's counsel, in his rebuttal closing argument, had informed the jury--over IBP's objection--that the State would receive 75 percent of any punitive damage award (Tr. 336), the jury found in favor of Mr. Wilson on both claims, awarding $4,000 in presumed compensatory damages and $15 million in punitive damages.

In its post-trial motions, IBP contended, among other things, that there was no evidentiary basis for any compensatory damages and that the punitive damage award was grossly excessive and the product of passion and prejudice. Defendants' Motion for Judgment Notwithstanding the Verdict, Alternative Motion for New Trial, and Request for Oral Argument at 1-3. The trial court, in its March 2, 1995 order, rejected IBP's argument with respect to compensatory damages. The court found that IBP had committed "slander per se" and therefore

respondent did not have to "prove . . . damage to prevail in such an action" because slander per se "is presumed to have slanderous effect." App. at 40a. The trial court also found that the evidence supported a verdict that Ms. Arndt's allegedly slanderous statements to Dr. Hamsa "disrupted" respondent's relationship with Dr. Hamsa, and that respondent "suffered a loss of reputation" at least "in the eyes of Dr. Hamsa . . . as a result of the communication." *Id.* at 42a.

The trial court, citing, *inter alia*, this Court's decisions in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991); and *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), held that the $15 million punitive damage award was "grossly excessive and bear[s] no reasonable relation to the Plaintiff's actual damages," App. at 44a-45a, and was "likely the result of passion or prejudice on the part of the jury." *Id.* at 45a. The court emphasized that the punitive damages could only be imposed against IBP in this case "based upon the conduct 'from which the claim arose.'" *Id.* (citing *Coster v. Crookham*, 468 N.W.2d 802, 810 (Iowa 1991); *Burke v. John Deere Co.*, 6 F.3d 497, 507, 511 (8th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994)). The court found that IBP's conduct giving rise to the claim in the instant case "is not so egregious to warrant such a large award. Quite simply, an award of $15,000,000 does not bear any reasonable relation to the harm or even the potential harm to the [Plaintiff] resulting from the statements of defendant Arndt to Dr. Hamsa." *Id.*

Consequently, the trial court granted a new trial on punitive damages unless Mr. Wilson accepted a remittitur of the punitive award to $100,000, "a sum [that] is 25 times the amount of the Plaintiff's actual damages, according to the jury's compensatory damage award." App. at 45a. The

court concluded that such a punishment "reflects a more reasonable relation between the two awards and still succeeds in punishing the defendant[s] and deterring future similar conduct." *Id.* When Mr. Wilson did not accept the remittitur, the trial court ordered a new trial.

Mr. Wilson then appealed to the Supreme Court of Iowa from the order granting a new trial, and IBP and Ms. Arndt cross-appealed on a variety of issues. Like the trial court, the supreme court rejected IBP's argument that there was no basis, as a matter of law, for awarding *any* compensatory damages. The court declared that "[s]lander per se . . . is actionable without proof of damage." App. at 12a. The court also noted that "Wilson testified that as a result of the incident, he was unable to return to work because of lack of self-esteem and distrust of his employer, and that he suffered damage to his reputation as a result of Arndt's statements." *Id.* Based on this analysis, the court held that there was "sufficient evidence . . . to support submission of the damage claim and the jury's verdict." *Id.*

Mr. Wilson's appeal was from the unconditional grant of a new trial that resulted from his failure to accept the remittitur set by the trial court; neither the conditional new trial order nor the $15 million jury verdict was before the supreme court for review. Although it affirmed the trial court's ruling that the $15 million punitive award was excessive, the supreme court ruled that the remittitur of the punitive damage award in the conditional new trial order should be *increased* from $100,000 to $2 million, leaving a 500 to 1 ratio between the punitive damage award and the $4,000 presumed compensatory award--the exact punitive and compensatory amounts and ratio that this Court found to be a "breathtaking" indicator of unconstitutionality in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). Despite purporting to apply *BMW*, the Iowa Supreme Court found this ratio to be of "minor

significance." App. at 32a. The court below also did not even mention the third *BMW* guidepost, which requires comparison of the punitive damage award to civil and criminal penalties for comparable conduct. 116 S. Ct. at 1603.

Moreover, even though this Court in *BMW* did not rely on the defendant's financial status to assess the constitutionality of the $2 million award in that case and held that one State could not punish lawful out-of-state conduct, the Iowa Supreme Court in the instant case interpreted this Court to have "approved" its reliance on IBP's wealth and international business activities. App. at 32a. Therefore, in increasing the award twenty-fold, the court emphasized:

> IBP is the largest producer of fresh beef and pork in the world. It operates eighteen separate beef or pork plants in nine states, as well as nineteen other plants, warehouses, tanneries and refineries. The company has a sales network of ten regional and international service centers in the United States, Europe, and Asia. IBP employs 29,000 people, had net sales in 1993 of $11.6 billion and had a net worth of $600 million.

App. at 32a-33a.

Despite the fact that no judgment had ever been entered on any punitive damage award, the Iowa Court "affirmed" "judgment for punitive damages in favor of plaintiff against defendant IBP . . . in the amount of $2 million if plaintiff agrees to a remittitur of all punitive damages exceeding that amount." App. at 33a. Pursuant to "the statutory directive of Iowa Code section 668A.1(2)(b)," the court held that, whatever remained of the punitive damage award after

payment of respondent's "attorney fees applicable to the recovery of the $2 million award" and payment of 25 percent of the award to respondent himself, must be paid into the State's "Civil Reparations Trust Fund." App. at 33a-34a.[2]

In their petition for rehearing, IBP and Ms. Arndt challenged the constitutionality of the $2 million penalty, arguing that it was utterly inconsistent with *BMW*. The Iowa court denied the petition without opinion on February 14, 1997. App. at 35a.

After the case was remanded to the trial court, respondent accepted the remittitur. Petitioners opposed entry of judgment, on the ground that the $2 million penalty violated the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment. The trial court nonetheless entered judgment on April 30, 1997, allocating the punitive damage award as follows: 40 percent to plaintiff for his attorney fees; 25 percent to plaintiff; and the remainder to the State. App. at 48a.

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[2] Section 668A.1(2)(b) provides in relevant part that "after payment of all applicable costs and fees, an amount not to exceed twenty-five percent of punitive or exemplary damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered paid into a civil reparations trust fund administered by the state court administrator."

REASONS FOR GRANTING THE WRIT

A. The Court Should Grant Certiorari And Summarily Reverse Because The $2 Million Penalty Imposed Below Is Clearly Contrary To *BMW*

Summary reversal is appropriate in "palpably clear cases of constitutional error." *Eaton v. City of Tulsa*, 415 U.S. 697, 707 (1974) (Rehnquist, J., dissenting). A lower court decision that is clearly inconsistent with a constitutional ruling of this Court is such a "palpably clear" error. *See, e.g., Lambert v. Wicklund*, 117 S. Ct. 1169 (1997); *Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981). The decision of the Iowa Supreme Court in this case is plainly irreconcilable with the constitutional limits on punitive damages articulated by this Court in *BMW* and should be summarily reversed.

1. The Iowa Supreme Court's Assessment Of A $2 Million Penalty In This Case Is Flatly Inconsistent With *BMW*

The punitive damage award settled upon by the Iowa Supreme Court is clearly unconstitutionally excessive when measured against each of three *BMW* guideposts--a result of that court's flouting of those guideposts. Moreover, not once in its opinion did the Iowa court consider whether IBP had "fair notice" of the severity of the penalty that the court decided to impose, as required by *BMW*. *See BMW*, 116 S. Ct. at 1598. The $2 million penalty in this case therefore must be reversed for the same reasons as was the $2 million penalty in *BMW* itself.

With regard to the first *BMW* guidepost--reprehensibility of the alleged misconduct--Ms. Arndt's allegedly

slanderous statements to Dr. Hamsa were "not sufficiently reprehensible to warrant imposition of a $2 million exemplary damages award." *BMW*, 116 S. Ct. at 1601. The statements were made only to Doctor Hamsa, caused Mr. Wilson no physical, emotional or even economic injury and were in large part true, as Mr. Wilson himself admitted both to the doctor and at trial that he had not remained in bed when advised to do so. (*See* Tr. 32-33; Exh. 19)[3] And it is undisputed that Mr. Wilson ultimately received all the medical treatment that he requested.

Moreover, the IBP conduct that the court below cited as justifying punitive damages consisted entirely of legal conduct designed to preclude workers' compensation waste and fraud, which the court nevertheless concluded created a "climate of suspicion toward the legitimacy of injuries to workers." App. at 22a. This "climate" included IBP's preference for "ultraconservative physicians" to treat injured workers--without any allegation that such doctors violated any applicable standard of care in any case, much less Mr. Wilson's; that IBP occasionally conducted surveillance of injured workers--without any allegation that such surveillance violated any law; and that workers who did not cooperate with their treatment plans were assigned to light duty--again, without any allegation that such assignments violated any law. *See* App. at 22a. Indeed, on the issue of surveillance of personal injury claimants, other courts have held that "there is much social utility to be gained from these investigations. It is in the best interests

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3 In fact, Mr. Wilson was in jail for at least part of the time that he was supposed to be on bed rest. (Tr. 5) Although the jury was not apprised of that fact because it was deemed unduly prejudicial (Tr. 6), the court surely could take it into account in assessing the reprehensibility of Arndt's communication to Dr. Hamsa that Mr. Wilson was not complying with the doctor's instructions.

of society that valid claims be ascertained and fabricated claims be exposed." *Forster v. Manchester*, 189 A.2d 147, 150 (Pa. 1963); *see also Johnson v. Corporate Special Servs., Inc.*, 602 So. 2d 385, 388 (Ala. 1992) (holding that individual filing workers compensation claim "should have expected a reasonable amount of investigation into his physical capability"); *McLain v. Boise Cascade Corp.*, 533 P.2d 343, 346 (Or. 1975) ("It is well established that one who seeks to recover damages for alleged injuries must expect that his claim would be investigated . . . ."). A "climate" created by conduct that not only is not unlawful, but in fact has "much social utility," cannot possibly evince the level of reprehensibility necessary to support any punishment, much less a multimillion dollar award. *See BMW*, 116 S. Ct. at 1597 n.19 ("'To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.'") (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)).

The Iowa Supreme Court vaguely suggested that "[t]he evidence indicated that Mr. Wilson's treatment as an injured worker was not a one-time or isolated instance" and that "[o]ther workers with injuries could be profoundly affected as a result of the policy actions carried out by Arndt and IBP." App. at 32a. Yet, the Iowa court points to no evidence in the record--because there is none--suggesting that any "slanderous" statement had been made to the doctor of any other injured worker. Moreover, there is absolutely no evidence that any other worker suffered any harm from the actual conduct at issue in this case or that any worker had suffered any harm remotely similar to that claimed by Mr. Wilson, or even that any worker had been injured in any other way by the purported "climate of suspicion." The Iowa court, in effect, improperly "justif[ied] the award of punitive damages in [this] particular case by overlooking the actual events and focusing on potential victims of similar *hypothetical* torts."

Pulla v. Amoco Oil Co., 72 F.3d 648, 659 (8th Cir. 1995) (White, J.) (emphasis in original); *see also Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634, 639-40 (10th Cir. 1996) ("In figuring harm both actual and potential harm may be considered. But it must be harm to these plaintiffs, not others."), *petition for cert. filed*, 65 U.S.L.W. 3675 (U.S. Mar. 31, 1997) (No. 96-1546).

The Iowa Supreme Court also ignored this Court's admonition in *BMW*: "That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages, does not establish the high degree of culpability that warrants a substantial punitive damages award." 116 S. Ct. at 1601. The Iowa court did not make any effort to calibrate the degree of reprehensibility of the conduct here.

Indeed, although the court stated that the "extent and nature of the outrageous conduct is considerable when compared with other cases that have assessed the reprehensibility of defendants' acts," App. at 32a, it did not actually cite any such cases or the amount of punitive damages imposed in such cases.[4]

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[4] The court's discussion of the facts of the case contains several fundamental inaccuracies. First, the court asserts that no videotape existed, *see* App. at 19a, when in fact there was a videotape, which was entered into evidence. (Tr. 231; Exh. 17) Second, the court states that Ms. Arndt admitted making up the story about the videotape, App. at 20a, when in fact she testified at trial that the corporate claims adjustor, Geri Collins, had told her before she made the call to Dr. Hamsa that there was a video. (Tr. 272, 286) Ms. Arndt also specifically denied having told Dr. Hamsa that the video was of Mr. Wilson working on his car. (Tr. 271) Third, the court refers to Karen Beam--the almost exclusive source of such allegations as that IBP preferred "ultra-conservative" physicians (*see* Tr. 69)--as being a nurse, *see* App. at 20a (referring to Beam as a "nurse colleague" of

If the court had actually looked to other Iowa punitive damage cases, it would have found that the *highest* punitive damage award *ever* affirmed in a reported appeal was 25 percent *less* than the $2 million penalty imposed here and was assessed in a personal injury case in which the plaintiff died as a result of the defendants' alleged tortious conduct and in which compensatory damages totaled more than $1.4 million. *See Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 857 (Iowa 1994) (affirming punitive damage award of $1.5 million). Here, by contrast, there was no physical or even economic injury alleged or found; compensatory damages were merely presumed to flow from the allegedly slanderous statements effect on Mr. Wilson's reputation in the eyes of one person--Dr. Hamsa--and totaled only $4,000.

The Iowa court outright dismissed *BMW's* second guidepost, the ratio of actual harm to punitive damages, 116 S. Ct. at 1601, as being "[o]f minor significance." App. at 32a. To underline its view that this guidepost does not deserve meaningful analysis, the court actually *increased* the punitive damage award approved by the trial court to the exact amount struck down in *BMW*, thereby producing the precise "breathtaking" 500:1 ratio that this Court rejected in *BMW*. The court made no attempt whatsoever to justify such a ratio and, in fact, there is no more justification for such a gross disparity here than there was in *BMW*. IBP could not possibly have had notice that it would be subject to such a penalty on account of the allegedly false statements of one nurse to one doctor concerning a single employee.

Arndt); in fact, Beam was a high school graduate with no medical training and no background in nursing. (*See* Tr. 61-63)

Nor did the Iowa court even mention--either in its cursory discussion of *BMW* or in its equally cursory discussion of the appropriate amount of punitive damages--the third *BMW* guidepost: comparison to legislatively established penalties. 116 S. Ct at 1603. That guidepost confirms that $2 million violates due process. After proof of liability beyond a reasonable doubt--a procedural protection that IBP did not have in this proceeding--the highest fine that could have been imposed would have been $1,500. *See* Iowa Code § 903.1(b). The corporation also would have been subject to paying the victim three times the victim's loss--here an additional penalty of $8,000 (in addition to the $4,000 of compensatory damages already levied)--and a criminal surcharge of 30 percent of the fine--an additional $450. *See* Iowa Code § 909.4; Iowa Code § 911.2. Thus, the maximum penalty that could have been imposed for a finding of *criminal* liability--which was not made here--would have been less than $10,000. The $2 million fine levied against IBP here is thus more than 200 times larger than that legislatively established monetary punishment. Such a gross disparity demonstrates that nothing in the enactments of the Iowa Legislature put IBP on notice that it could be subject to a multi-million dollar penalty for the conduct at issue in this case.[5]

The Iowa court not only ignored two of the three *BMW* guideposts for determining fair notice, it then proceeded to justify the multimillion dollar penalty by looking to IBP's financial position and the international scope of its

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5 IBP likewise was not put on notice of a possible multi-million punishment by any conceivably relevant federal enactment. The maximum penalty for making a false entry in OSHA records, assuming for argument's sake that IBP could be punished for such conduct in this case, is $10,000. 29 U.S.C. § 666(g).

operations. App. at 32a-33a. The court stated its view that this Court had "approved" of such analysis, but the Court has done the opposite. In *BMW*, the Court pointedly did *not* include the defendants' financial status as a guidepost, instead announcing that "[t]he fact that [a defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business." *BMW*, 116 S. Ct. at 1604. And the Iowa Supreme Court's focus on the company's international operations runs counter to *BMW*'s prohibition on extraterritorial punishment. *See id.* at 1595-98.

In short, the decision below committed palpably clear constitutional error under *BMW*, and should be summarily reversed.

2. The Result In This Case Contrasts Sharply With The Results In Cases That Have Faithfully Applied *BMW*

Courts that--unlike the Iowa Supreme Court--have faithfully applied *BMW* have reached results that sharply differ from the $2 million penalty assessed by the Iowa court in this case. For example, *Schimizzi v. Illinois Farmers Insurance Co.* involved insurance bad faith resulting in compensatory damages of $45,000, far greater than the actual damages in this case. The court relied on *BMW* to reduce a $600,000 penalty to $135,000. 928 F. Supp. 760, 787 (N.D. Ind. 1996). Similarly, *Utah Foam Products Co. v. Upjohn Co.* involved fraudulent misrepresentation resulting in about $300,000 in actual damages. The court relied on *BMW* to slash a $5.5 million punitive award to about $600,000. 930 F. Supp. 513, 532 (D. Utah 1996). In discrimination suits, courts have looked to *BMW* for guidance in assessing the excessiveness of punitive damage awards, resulting in sharp reductions. *See*

Iannone v. Frederic R. Harris, Inc., 941 F. Supp. 403, 415 (S.D.N.Y. 1996) (reducing punitive award by 80 percent, from $250,000 to $50,000, where compensatory damages were less than $30,000); *Rush v. Scott Specialty Gases, Inc.*, 930 F. Supp. 194, 201-02 (E.D. Pa. 1996) (reducing punitive award by 90 percent, from $3 million to $300,000, where compensatory damages were $303,000); *see also Geuss v. Pfizer, Inc.*, 1996 WL 729048, at *12 (E.D. Pa. Dec. 17, 1996) (reducing punitive award in Americans with Disabilities Act case by 88.33 percent, from $150,000 to $17,500, where compensatory damages were $165,250). And the Alabama Supreme Court, in its first substantive review of punitive damage awards since being reversed in *BMW*, ordered massive reductions of multimillion dollar punitive damage verdicts for misrepresentation and suppression. *Foremost Ins. Co. v. Parham*, 1997 WL 112722, at *24-*25 (Ala. Mar. 14, 1997) (reducing two awards of $3 million each to $60,500 each and two awards of $4.5 million each to $114,500 and $112,500 respectively). In its reconsideration of the *BMW* case itself, the Alabama court reduced the $2 million punishment to $50,000. *BMW of North America, Inc. v. Gore*, 1997 WL 233910, at *16 (Ala. May 9, 1997).

Of particular note is the emphasis that courts reviewing awards have put on the guidepost that the Iowa court dismissed--the ratio of actual damages for punitive damages in determining excessiveness. *See Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943 (5th Cir. 1996) (vacating a punitive damage award in part because it was 6.5 times the compensatory award, thereby exceeding the 4:1 ratio that was close to the line) (citing *BMW*, 116 S. Ct. at 1602), *cert. denied*, 117 S. Ct. 767 (1997); *Continental Trend Resources*, 101 F.3d at 642 (ratio between 15:1 and 30:1 is "too large"); *Florez v. Delbovo*, 939 F. Supp. 1341, 1348 (N.D. Ill. 1996) (award of "more than 13 times the actual or potential damages . . . is clearly 'beyond the line'

in terms of constitutional propriety"); *Utah Foam Prods. Co.*, 930 F. Supp. at 532 ("The ratio [of 17.5 to 1] between the amount of actual damages awarded and the amount awarded as punitive damages is grossly excessive.").

As these cases demonstrate, meaningful application of *BMW* could not possibly support the $2 million penalty assessed by the Iowa Supreme Court in this case, where actual damages, which in any event were merely presumed, were only $4,000. Summary reversal is appropriate, because the Iowa Supreme Court has joined a minority of courts that have cited *BMW* without following it. *See Cates Constr., Inc. v. Talbot Partners*, 1997 Cal. App. LEXIS 252 (Cal. Ct. App. March 28, 1997) (approving $15 million punitive damage award for insurance bad faith, where the jury awarded $3.142 million in compensatory damages for breach of contract and $1 stipulated compensatory damages on bad faith claim); *PaineWeber Real Estate Securities, Inc. v. Fireman's Fund Ins. Co.*, No. A063060 (Cal. Ct. App. Jan. 3, 1997) (unpublished) (affirming $25 million punitive damage award, apparently the largest ever affirmed by a California appellate court, in insurance bad faith case with $3 million in compensatory damages); *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456, 468 (Idaho 1996) (affirming $3.2 million punitive damage award in breach of contract, fraud and bad faith case with $120,000 compensatory award for emotional distress and $3,800 for breach of contract).

B. In The Alternative, The Court Should Grant Plenary Review To Decide Whether Due Process Prohibits A Private Party From Pursuing Punitive Damages Where The State Takes A Share Of The Award

The Iowa Supreme Court, relying on Iowa Code § 668A.1(2)(b), specified in its opinion that the State of

Iowa Civil Reparations Trust Fund would receive what remained of the punitive damage award after the subtraction of applicable fees and costs, including reasonable attorney fees, and a 25 percent cut for Mr. Wilson himself. App. at 33a-34a.[6] Because the statute provides that 25 percent is the maximum portion of the award that could be paid to the plaintiff, the State in essence pays the attorney' contingency fee out of its share. Indeed, Mr. Wilson's counsel, in his rebuttal closing argument, informed the jury--over IBP's objection--that the State would receive 75 percent of any punitive damage award. (Tr. 336) A number of other States have established schemes similar to Iowa's in which the State takes a portion of punitive awards. *See, e.g.*, Ga. Code Ann. § 51-12-5.1(e)(2); Mo. Rev. Stat. § 537.675; Or. Rev. Stat. § 18.540; Utah Code Ann. § 78-18-1(3). The Court should grant plenary review and decide whether

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6 The payment of a substantial portion of the punitive damage award to the State also makes the award subject to the limitations of the Excessive Fines Clause of the Eighth Amendment. This Court, in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264 (1989), concluded that the Excessive Fines Clause was intended by the Framers of the Constitution to apply where the government either "has prosecuted the action [or] has . . . a right to receive a share of the damages awarded." Although the Court left the "question open," *id.* at 276 n.21, it strongly suggested that where, as here, a share of a punitive damage award is allocated to the State, the Excessive Fines Clause is applicable. *See, e.g., id.* at 272 (suggesting that if government was entitled to "a share in the recovery," Excessive Fines Clause would apply); *id.* at 275 (suggesting Clause would apply if State "used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual"); *id.* at 298-99 (O'Connor, J., concurring in part and dissenting in part) ("[T]he Court suggests . . . that the Excessive Fines Clause will place some limits on awards of punitive damages that are recovered by a governmental entity.").

such systems, which were unknown to common law and are of very recent origin, violate the Due Process Clause.

Punishments in our system of government are customarily sought by public officials, constrained by standards of accountability imposed on public prosecutors, who are precluded by law from having any personal stake in the outcome of the prosecution. Although early in our Nation's history, the States followed the English system of permitting private prosecutors in criminal cases, since the beginning of the 19th century, most States have been "firmly committed to the concept of official public prosecution." Note, *The Outmoded Concept of Private Prosecution*, 25 Am. U.L. Rev. 754, 763 (1976); *cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 783, 808 & n.10 (1987) (noting that most States have acknowledged the principle of a disinterested prosecutor). And in those few States that permit private prosecution of certain criminal offenses, restrictions are imposed that guarantee the due process safeguard of a disinterested prosecutor under the control of the executive.[7]

The punitive damage system, on the other hand, is driven by private litigants and their lawyers, who have a private interest in the outcome of the litigation and are unfettered by executive duties and responsibilities or by the accountability imposed by the democratic process. Indeed,

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[7] In these States, the private prosecutor is under the control of the district attorney's office and may participate in criminal proceedings only with that officer's permission. Note, *Private Prosecutors In Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure*, 54 Fordham L. Rev. 1141, 1153 & n.51 (1986). In addition, private prosecutors are forbidden from representing a plaintiff in civil litigation related to the criminal prosecution. *Id.* at 1154 & n.54.

plaintiffs' lawyers are bound to serve their private clients, not the public, and usually have a direct, material and purely personal interest in inflicting the greatest possible punishment in every case. "A person who is to profit by the punishment of another is likely to prefer severe punishment to admonition which will best serve social ends, and the two are not necessarily synonymous." Clarence Morris, *Punitive Damages in Tort Cases,* 44 Harv. L. Rev. 1173, 1178 (1931).

A system such as Iowa's, where the plaintiffs' counsel literally cloaks himself in the guise of a private attorney general by pointing to the State's share in the bounty he hopes to exact from the defendant, presents the most unfair system of private prosecution of public offenses. "A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980). Moreover, under the Iowa scheme, the State is basically a contingency fee client of the plaintiff's attorney. The State thereby can reap the benefits of the excesses of private prosecutors without incurring any of the burdens of adhering to the responsibilities and protections that ordinarily restrict the State's power to inflict and collect punitive fines. Indeed, the dangers of abuse are most acute under the very circumstances presented here, where the arm of the State that receives the payment is the judiciary, *see* Iowa Code § 668A.1(2)(b), and it is the judiciary that provides the only conceivable check on the private prosecutor.

This Court previously has warned that the consequences attendant on the wielding of prosecutorial power require an "assurance that those who would wield this power will be

guided solely by their sense of public responsibility for the attainment of justice." *Young*, 481 U.S. at 814. The result in this case underscores the validity of that warning. The Court now should take the next step and hold that "the practice--federal or state--of appointing an interested party's counsel to prosecute" defendants on behalf of the State "is a violation of due process." *Id.* at 814-15 (Blackmun, J., concurring). This Court therefore should grant plenary review and hold that where the State shares in a punitive damage award, due process "requires a disinterested prosecutor with the unique responsibility to serve the public, rather than a private client, and to seek justice that is unfettered." *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted and the case either summarily reversed in light of *BMW* or set for plenary consideration.

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Respectfully submitted,

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